No. 197.

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Filed Jan. 3, 1899.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

No. 197.

FREDERICK BAUSMAN, as Receiver of the RAINIER POWER AND RAILWAY COMPANY,	*Plaintiff in Error,*	No. 16725
vs.		
SAMUEL DIXON,	*Defendant in Error.*	

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF DEFENDANT IN ERROR

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No. 197.

FREDERICK BAUSMAN, as Receiver of the RAINIER POWER AND RAILWAY COMPANY, *Plaintiff in Error,* vs. SAMUEL DIXON, *Defendant in Error.*	No. 16,725

BRIEF OF DEFENDANT IN ERROR.

POINTS, ARGUMENT AND AUTHORITIES.

This is an action by the defendant in error against the plaintiff in error for damages for injury sustained by the negligence of the plaintiff in error.

For complaint see printed record, pages 1 to 4.

The answer is a denial of the different paragraphs of the complaint, and an affirmative defense alleging contributory negligence.

Printed record, pages 5 to 7.

The reply is a denial of the affirmative defense.

Printed record, page 8.

The action was tried by a jury, and verdict rendered in favor of the defendant in error for ten thousand dollars ($10,000.00).

Printed record, page 16.

There was also propounded to the jury certain interrogatories embracing questions of fact to be passed on, which questions of fact were answered by the jury and returned with its verdict.

Printed record, pages 16 to 21.

Motion for a new trial served and filed.

Printed record, pages 21 and 22.

The motion for a new trial was overruled and judgment entered upon the verdict of the jury.

Printed record, page 22.

Notice of appeal, and appeal bond served and filed.

Printed record, pages 23 and 24.

The Supreme Court of the State of Washington passed upon the questions assigned as error, and rendered its opinion.

Printed record, pages 116 to 119.

The only questions passed upon, were the questions of fact as to whether the evidence was sufficient to justify the verdict. The court affirmed the judgment upon the ground that the verdict of the jury was sustained by sufficient evidence. No other questions were presented or decided.

The writ of error was sued out, and the cause transferred to this court.

Printed record, pages 119 to 124.

The assignment of error presents no federal question to be passed upon by this Honorable Court.

Printed record, pages 122 to 124.

MOTION TO DISMISS.

The defendant in error served and filed his motion to dismiss the writ of error, for the reason that this court has no jurisdiction of the cause, because no federal question is presented for decision by the record. There is nothing in the record, in this cause, that will give this court jurisdiction.

Section 709 of the Revised Statutes of the United States.
Desty's Federal Procedure, 8th Ed., Vol. 1, Sec. 223.

There is nothing in the opinion in this cause, printed record pages 116 to 119, *supra*, to give the court any jurisdiction under the statute above mentioned.

This court is wholly without jurisdiction and the motion should be granted and the writ of error dismissed.

In the case of *Fowler et al. v. Lamson et al., 164 U. S., 252 (17 Supreme Court Reporter, 112)*, this court by Peckham, Justice, says:

"It has also been frequently decided that, to give this court jurisdiction on writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision by the state court, but that its decision was neces-

sary to the determination of the cause, and that it was decided adversely to the party claiming a right under the federal laws or constitution, or that the judgment as rendered could not have been given without deciding it."

The authorities supporting this decision are numerous; it is only necessary to refer this court to—

Louisville & N. R. Co. v. City of Louisville, 166 U. S., 709 (17 Supreme Court Reporter, 725).

Leyson v. Davis et al., 18 Supreme Court Reporter, 500.

Missouri, K. & T. Ry. Co. v. Haber et al., 18 Supreme Court Reporter, 488.

In *Volume 2 of Encyclopædia of Pleading and Practice, page 38*, the rule is laid down thus:

"A federal question exists when a party claims a right, title, interest or immunity under the constitution, or a treaty or statute of the United States. The record must show that the question was properly raised and actually decided below, or the court must be able to reasonably infer from the record that the decision of such question was necessarily involved in the judgment rendered. The determination of the question must have been adverse to the plaintiff in error. These requisites are jurisdictional, and where the judgment can be supported on grounds independent of the federal question the appeal will be dismissed."

The above doctrine is supported by a long line of decisions by this court, to which we call attention.

Under the rule laid down and the long line of decisions supporting it there is no way for the plaintiff in error to sustain its writ of error in this court, as the court is wholly without jurisdiction to pass upon the case. If the plaintiff in error can sustain its position in this court, then all cases where questions of fact are involved may be moved from the state supreme

court, on writ of error, to this court, which is contrary to the statute, section 709, *supra*, and to a long line of decisions by this court.

QUESTIONS OF FACT.

This court will not review questions of fact passed upon by a jury and sustained by the Supreme Court of the State.

In the case of *Noble et al. v. Mitchell, 164 U. S., 367* (*17 Supreme Court Reporter, 110*), this court says:

"This involves a mere question of fact, which was submitted to the jury by the trial court, and as to which the Supreme Court of Alabama said there was evidence sufficient for the consideration of the jury, and which is not subject to review here on writ of error."

The Supreme Court of the State of Washington in its opinion in this case, printed record, pages 116 to 119, was unanimous in sustaining the verdict of the jury, and under the rule laid down by this court, this court will not review the decision of the Supreme Court of Washington upon this point.

The rule is fully discussed and sustained in the case of *Dower v. Richards, 151 U. S., 658.*

In the case of *Dower v. Richards, supra*, the court says:

"No point has been more repeatedly and authoritatively settled than that this court will not, upon a writ of error, revise or give judgment as to the facts, but takes them as found by the court below, and as they are exhibited by the record."

In the same case the court says:

"And if the decision of the state court rests on an independent ground of law, not involving any federal question, this

court has no jurisdiction. The reasons against its jurisdiction are as strong, if not stronger, when the decision of the state court proceeds upon matter of fact only."

As the only matter passed upon by the state court was a question of fact, as shown by the opinion of the state court, this court is wholly without jurisdiction to change the decision.

Missouri v. Andriano, 138 U. S., 496.

New Orleans Water Company v. Louisiana Sugar Refining Company. 125 U. S., 18.

Eustis v. Bolles, 150 U. S., 361.

California Powder Works v. Davis, 14 Supreme Court Reporter, 350.

In re Buchanan, 158 U. S., 31.

TESTIMONY.

It is only necessary to examine the testimony set out in the printed record, on pages 27 to 116, to see that every finding of the jury is justified by the testimony. In fact the verdict of the jury was supported by the testimony, and in addition to the general verdict the special findings of the jury on pages 16 to 21, printed record, show that the jury passed upon every point, and while we do not believe, under the authorities above referred to and the practice of this court, that this court will attempt to pass upon the testimony, yet should the court decide that it had jurisdiction to do so, we then contend that there is no error in the decision of the Supreme Court of the State of Washington, as the verdict of the jury was sustained by sufficient evidence.

FIRST.

We ask that the writ of error be dismissed because there is no federal question involved in the record.

SECOND.

We ask that the writ of error be dismissed because nothing but a question of fact was raised, or presented or passed upon, by the Supreme Court of the State of Washington.

THIRD.

In case the above motion be overruled we ask that judgment be affirmed, on the ground that the testimony *does* sustain the verdict of the jury.

Wherefore, defendant in error asks that the judgment be, in all things, affirmed.

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